

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

EON-NET, L.P.,

Plaintiff,

v.

FLAGSTAR BANCORP, INC.,

Defendant.

CASE NO. C05-2129MJP

**ORDER SETTING
SANCTIONS PURSUANT
TO FED. R. CIV. P. 11**

This matter comes before the Court pursuant to Defendant Flagstar Bancorp's ("Flagstar") Memorandum Establishing Attorneys' Fees and Costs (Dkt. No. 80), filed as directed by this Court's Order on Sanctions Pursuant to Fed. R. Civ. P. 11 (Dkt. No. 79). Defendant Flagstar requests its reasonable attorneys' fees and costs in this litigation in the amount of \$141,984.70.

This Court previously found Plaintiff Eon-Net, L.P. ("Eon-Net") and its counsel failed to undertake a reasonable pre-filing investigation of Defendant Flagstar's allegedly infringing software before filing suit for patent infringement. The Court found that Eon-Net and its counsel asserted frivolous claims, failed to identify infringing products or functionality, and failed to compare any product or functionality against the claims of the

1 '697 Patent before filing suit. The Court concluded that Eon-Net asserted and maintained
2 baseless claims of patent infringement in hopes of a quick settlement in violation of Rule
3 11, and awarded Defendant Flagstar its reasonable attorneys' fees and costs in this
4 litigation.

5 To establish Flagstar's attorneys' fees and costs, the Court set a briefing schedule
6 regarding fees and costs. The Court has now reviewed Flagstar's Memorandum
7 establishing attorneys' fees and costs (Dkt. No. 80), the Opposition filed by Plaintiff
8 Eon-Net (Dkt. No. 84), and Flagstar's Reply (Dkt. No. 85), and the supporting
9 declarations and exhibits submitted by the parties.

10 **I. DISCUSSION**

11 **1. Monetary Sanctions**

12 The Court's Order on Sanctions Pursuant to Fed. R. Civ. P. 11 (Dkt. No. 79)
13 awarded Defendant Flagstar its "reasonable attorneys' fees and costs expended to date in
14 this litigation." The Order outlined Eon-Net's indiscriminate failure to comply with Rule
15 11, and determined that sanctions were appropriate. The Court also noted Eon-Net's
16 apparent scheme to extort quick settlement from numerous corporations doing business
17 on the internet. The Court's Order concluded that monetary sanctions, as well as notice
18 to the parties and courts involved, provided an appropriate deterrent for the inappropriate
19 conduct witnessed in this case. See id. at 17 ("An appropriate sanction is required to
20 deter future bad conduct.").

21 In opposition to Flagstar's Memorandum establishing attorneys' fees and costs,
22 Eon-Net essentially urges the Court to reconsider its award of monetary sanctions.
23 Eon-Net urges the Court to find that the non-monetary sanctions have deterred Eon-Net
24 and its counsel from "asserting the '697 Patent against web sites that use HTML forms
25 technology." See Pl.'s Opp'n at 2-3 (Dkt. No. 84). Eon-Net notes that it is in the process
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1 of dismissing “every existing Eon-Net infringement action.” Id. On that basis, Eon-Net
2 requests that the Court decline to award monetary sanctions.

3 The primary purpose of Rule 11 is to “deter repetition of the conduct by the
4 offending person” and to deter “comparable conduct by similarly situated persons.” Fed.
5 R. Civ. P. 11 Advisory Committee Notes; View Eng’g, Inc. v. Robotic Vision Sys., Inc.,
6 208 F.3d 981, 987 (Fed. Cir. 2000). The deterrent purpose of the Rule would not be
7 served if the Court allowed a misbehaving party to avoid sanctions, simply by dismissing
8 other similar cases where they failed to perform a reasonable pre-filing inquiry, or to
9 reasonably evaluate the claims of the patent at issue. Indeed, the Plaintiff’s approach
10 would transform Rule 11 into the mere threat of sanctions, rather than an actual deterrent
11 to misconduct.

12 Rule 11 is a “sanction provision to compel appropriate advocacy, not a simple fee
13 shifting rule.” See United Services Funds v. Ward, 121 F.R.D. 673, 678 (D. Alaska
14 1998). The Court cannot agree with Eon-Net’s contention that the deterrent purpose of
15 Rule 11 would be served in this case without monetary sanctions. Rule 11 sanctions may
16 not be avoided, after the fact, by taking actions which should have been taken during the
17 21-day grace period afforded by Rule 11(c)(1)(A). A monetary sanction in this case is
18 appropriate to deter future instances of bad conduct by Eon-Net and its counsel; similarly,
19 monetary sanctions in this case will help to deter future inappropriate conduct by other
20 patent plaintiffs tempted to adopt a similar style of litigation. The purposes of Rule 11
21 are properly served by an award of monetary sanctions against the Plaintiff in this case.

22 **2. Amount of Sanctions**

23 Defendant Flagstar’s Memorandum Establishing Attorneys’ Fees and Costs (Dkt.
24 No. 80) sets forth its request for attorneys’ fees and costs of \$141,984.70. The
25 Memorandum includes great detail as to the efforts of Flagstar’s counsel, including
26 281.25 hours billed by associate Melissa Baily, 48.6 hours billed by partner Jon Steiger,
27 and 3.3 hours billed by partner Charles Verhoeven. See Def.’s Memo. (Dkt. No. 80) at 3.

1 Flagstar also requests attorneys' fees and costs for local counsel: 21.2 hours billed by
2 associate Jofrey McWilliam, and 4.9 hours billed by partner Brad Keller. See id. at 4.

3 Eon-Net argues that any attorneys' fees award against it should be limited. Eon-
4 Net alleges that Flagstar's attorneys billed excessive time at unreasonable rates, provided
5 Eon-Net with inaccurate information regarding its website, and provided the Court with
6 inaccurate information. Eon-Net also alleges that Flagstar failed to mitigate its damages.
7 The Court addresses each basis for a reduction in the attorneys' fees award due Flagstar.

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9 **A. Representations at the Rule 11 Hearing**

10 Before oral argument on September 8, 2006, the Court sent questions by email to
11 the lawyers for the parties. The questions sought to guide the parties' presentations at
12 oral argument, and the email instructed the parties to address various questions during
13 argument. A question to Defendant Flagstar inquired as to what attorneys' fees Flagstar
14 was requesting: "What attorney's fees does Flagstar seek as part of its motion for
15 sanctions pursuant to Rule 11?" Flagstar's counsel, Melissa Baily, responded during oral
16 argument that Flagstar's fees totaled approximately \$95,000.

17 As previously noted, Flagstar now requests attorneys' fees of \$141,984.70.
18 Eon-Net characterizes this difference as a "large discrepancy" and questions the
19 truthfulness of the records submitted by Flagstar's counsel:

20 [t]his large discrepancy, therefore, calls into question the veracity of the
21 time records Flagstar now submits to the Court and whether the time
records actually reflect work performed by Quinn Emanuel attorneys.

22 See Pls.' Opp'n (Dkt. No. 84) at 7. On short notice, Flagstar provided a "ballpark" figure
23 as to its attorneys' fees. The Court finds no misrepresentation occurred, and finds no
24 basis for questioning the veracity of Flagstar's time records.

25 **B. Failure to Mitigate**

26 An award of attorneys' fees pursuant to Rule 11 is limited to expenses and fees
27 reasonably necessary to resist the offending action. See, e.g., In re Yagman, 796 F.2d
28 1165, 1184-85 (9th Cir. 1986). Eon-Net contends that any award of attorneys' fees to

1 Flagstar must be reduced because Flagstar did not raise its defense to infringement earlier
2 in the litigation. Eon-Net argues that Flagstar “could have mitigated the fees it incurred
3 by raising the Kofax license issues in May 2005 rather than delay doing so for nine
4 months . . .” See Pls.’ Opp’n (Dkt. No. 84) at 6. In Reply, Flagstar notes that it tried for
5 months to convince Eon-Net that its suit was baseless. Flagstar specifically informed
6 Eon-Net that the suit was a bad faith shakedown suit, and that Flagstar would seek Rule
7 11 sanctions.

8 Patent litigation is expensive, and usually a time consuming affair. The Court is
9 not persuaded that Flagstar could have mitigated its costs and legal fees by filing an
10 earlier motion, or by taking some different course. Rather, the Court finds that Flagstar
11 took a reasonably effective, direct route to summary judgment and its motion for
12 sanctions. The Court finds that Flagstar did not fail to mitigate its costs and legal fees.¹

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14 **C. Time Billed**

15 Eon-Net argues that Flagstar billed an excessive amount of time in this case. The
16 measure of a monetary award is one of reasonableness, and is not the amount actually
17 expended. See In re Yagman, 796 F.2d at 1185. The Court’s own review of the time
18 spent by Flagstar’s counsel shows a reasonable amount of time was spent on each task,
19 and time was appropriately allocated between associates and partners. Eon-Net’s attempt
20 to reduce Flagstar’s billing rates to a “per page” rate is unavailing. Flagstar was well-
21 represented, prevailed on nearly every motion it filed, and the Court finds that the amount
22 of time spent by Flagstar’s counsel was reasonable.

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26 ¹ Eon-Net also argues that Flagstar made misstatements with regard to its HTML forms
27 technology and the applicable scope of the Kofax license. This argument is without merit. Eon-
28 Net made generalized claims of infringement without identifying the allegedly infringing product
or functionality. Flagstar’s defense under the Kofax license was entirely proper, regardless of
other software that may have been used in Flagstar’s web operations.

1 Eon-Net's argument that Flagstar billed an "excessive" amount for its participation in the
2 Rule 11 hearing before this Court is also without merit. The Court commends Flagstar for
3 recognizing that a capable associate (with a much lower hourly rate) was equipped to handle all
4 aspects of the oral argument itself, with the assistance of local counsel.²

5 **D. Hourly Rates**

6 Eon-Net contends that Flagstar's hourly rates are excessively high. Eon-Net
7 contends the Court should find an "average market rate for attorneys in the Seattle area of
8 \$138.20/hr." See Pl.'s Opp'n (Dkt. No. 84). Flagstar's counsel, the Quinn Emanuel firm,
9 charged substantially more than \$138.20 per hour in this case. Mr. Verhoeven's billing
10 rate in this case was \$650 per hour. Mr. Steiger's rate was initially \$600 per hour, and
11 increased to \$645 per hour in September 2006. Ms. Baily's billing rate was initially \$310
12 per hour, and increased to \$350 per hour in September 2006. The drafting and research
13 in this case appears to have been appropriately allocated between the partners and the
14 associate, Ms. Baily, who billed the vast majority of time and has the lowest billing rate.

15 Eon-Net's apparent contention is that the average market rate for "reasonably
16 competent counsel" is \$138.20, and that Flagstar should not recover attorneys' fees in
17 excess of that amount. The federal courts are well aware of the high cost of patent
18 litigation, and this Court must reject Eon-Net's assertion that "reasonably competent"
19 patent litigation counsel may be obtained for \$138.20 per hour. After reviewing the
20 American Intellectual Property Law Association Economic Survey, see Second Baily
21 Decl. (Dkt. No. 85), Ex. 4, the Court concludes that Flagstar's counsel's rates are
22 consistent with rates charged by attorneys in similar cases, both in the Western District of
23 Washington and throughout the United States. See View Eng'g, 208 F.3d at 987
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27 ² Flagstar's attorneys' fees and costs exclude time billed to others members of a
28 joint defense group; as a result, Flagstar requests less in attorneys' fees than it actually
billed to the entire joint defense group.

1 (approving district court's lodestar determination based in part on AIPLA economic
2 survey); see also Meiklejohn Decl. at ¶¶ 3-4.

3 The Court also notes several additional factors which justify the hourly rates in
4 this case. First, this was an infringement action with implications on a national scale.
5 Flagstar was justified in choosing a trial firm based on skill, reputation, and experience.
6 Second, while Flagstar's counsel may have charged a high hourly rate, the work was high
7 quality and Flagstar's counsel was successful at every turn. Lastly, Eon-Net itself has
8 benefitted from the high cost of the patent lawyers whose fees it now seeks to deny. The
9 exceedingly high cost of patent litigation provides an infringement defendant facing
10 frivolous, baseless litigation with a strong incentive to settle; such defendants may be
11 willing to pay a "small" settlement to avoid hundreds of thousands, or millions, in legal
12 fees. It would be unjust to allow the Plaintiff to reimburse Flagstar at \$138.20 per hour
13 when scores of other defendants have defended against its baseless lawsuits at market
14 rates (i.e. \$300 - \$600 per hour).
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16 The hourly rates charged by patent litigation counsel may not be acceptable in
17 every case where fees are an issue. In this case, however, the hourly rates of Mr.
18 Verhoeven and Mr. Steiger are considered together with Ms. Baily's lower hourly rate,
19 the efficient allocation of time between partner and associate, and the overall
20 reasonableness of Flagstar's attorneys' fee request. Flagstar's hourly rates are not
21 excessively high and the Court declines to reduce those rates in determining Flagstar's
22 reasonable attorneys' fees and costs. The Court similarly rejects Eon-Net's challenge to
23 various other costs, such as photocopying, which the Court concludes were necessarily
24 and reasonably incurred by Flagstar's counsel in the course of this action.
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II. CONCLUSION

Flagstar is entitled to its reasonable attorneys' fees and costs in the amount of \$141,984.70, and the Clerk is directed to enter judgment in that amount.

IT IS SO ORDERED.

Dated this 19th day of December, 2006.

/s/ Marsh J. Pechman

MARSHA J. PECHMAN
United States District Judge